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Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. [redacted] 69

BERNARD M. SHOTKIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO, ex rel. THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO AND BRIEF IN SUPPORT OF PETITION.

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Attorney for Petitioner.

CHAMPLIN-SWEALY COMPANY, CHICAGO

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PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioner, Bernard M. Shotkin, respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of the State of Colorado.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

In the case of *Shotkin* v. *Kaplan,* 116 Colo. 296 (1947), page 229, the Supreme Court of Colorado said as to the petitioner:

> "(4) that thenceforth Shotkin, appearing other than by counsel, shall desist from instituting actions

> in Colorado state trial courts, and from prosecuting writs of error here; (5) that all cases pending at *nisi prius*, or here, in which Shotkin is plaintiff or plaintiff in error, and appears *pro se*, and in which he does not proceed reasonably to employ counsel to represent him, shall be subject to dismissal." (Rec. 5.)

The court at the same time said: "There is not involved here the right of a party to represent himself when made defendant or defendant in error." The above statements are re-stated in *Shotkin* v. *Lindsley*, 118 Colo. 224.

Attention may be called to the fact that the statement is not applied to defenses; that as to a complaint there must be a process "reasonably to employ counsel to represent him", and that the failure to do so will make the complaint "subject to dismissal".

Petitioner, who operates a store in Denver, Colorado, dealing in electrical appliances and fixtures, had regularly paid a state sales tax upon sales made in the State of Colorado and was in 1948 sought to be taxed some $5000 for previous wholesale transactions and transactions without the state and with reference to articles never within the state (Rec. 33, 47, 50), the petitioner's store being kept closed for several months and its renewed operation thereafter being obtained only by the payment of such illegal tax (Rec. 31, 35, 47).

With respect to the issues presented by the sales tax imposed upon transactions entirely in other states, petitioner, aware of an attitude of lawyers occasioned by the previous statement by the Supreme Court of Colorado, sought to obtain an attorney to represent him, interviewing unsuccessfully 150 attorneys, the Denver Bar Association, and the Denver Legal Aid (Rec. 48). He finally found an attorney who appeared for him in several of the first court proceedings, but who subsequently withdrew without notice to petitioner (Rec. 51, 52).

With respect to the transactions here involved it is obvious that petitioner sought "reasonably to employ counsel to represent him" (Rec. 5, Par. 10), and that such counsel did represent him twice in proceedings in which such representation is denied by respondent (Rec. 52, 2-3).

The proceeding here brought by respondent relates to the sales tax issue heretofore referred to, and as to which the state trial court said:

> "The Court feels this way about that matter: I think perhaps you have an interest in this matter really as a defendant, that you were appearing to defend against what you claim to be an illegal tax; that in a measure your rights appear to be the rights of a defendant, and that I don't think the case of *Shotkin* v. *Kaplan* is controlling in this particular matter" (Rec. 54, 60).

Upon reference to the same problem and to the same issue, a Judge of the United States District Court before whom the matter was presented cited the above-noted case of *Shotkin* v. *Kaplan,* and said "that respondent was actually a defendant defending himself against the Tax Collector's deficiency sales tax assessment, even though he had to title himself plaintiff" (Rec. 56).

This case is a complaint in contempt, criminal in character, brought by the Attorney General of the State of Colorado, and limited to appearance, by petitioner, either personally or by filing, in court proceedings regarding a state tax charged against him (Rec. 2-5). It is one of the duties of the attorney general to commence action for the recovery of state sales taxes (Colo. Statutes Annotated, ch. 144, sec. 25(g)). The complaint was filed on June 10, 1948, and was promptly received by the Supreme Court of Colorado on June 10, 1948 (Rec. 1).

Upon three occasions petitioner moved that the State Supreme Court appoint counsel for him in the contempt

proceedings, subject to fees to be fixed by the Court; and the Court rejected his motion in each case (Rec. 7, 8, 30, 33, 61, 62). He was also unsuccessful in seeking witnesses in open court, with oral argument (Rec. 10, 16).

On December 12, 1949, the Supreme Court of Colorado issued the following judgment, which is the basis of the present petition:

"Original Proceeding.

Judgment—December 12, 1949.

> At this time the cause coming on to be heard upon the rule heretofore entered requiring said respondent to show cause why he should not be punished for contempt and also the argument of counsel thereon; the Court being fully advised in the premises, it is accordingly adjudged that the respondent is guilty of contempt of this Court, and it is ordered that the motion for summary judgment be sustained. It is further ordered and adjudged that the respondent is guilty of contempt of Court as charged herein, and that he be confined in the County Jail of the City and County of Denver for and during the period of sixty days; provided, that execution herein shall be stayed until the further order of the Court.

En Banc, December 12, 1949" (Rec. 75).

Attention may be called to the fact that there was no counsel who could argue for the petitioner.

This Court Has Jurisdiction.

Jurisdiction of this Court is invoked under Section 1257(3) of the Judicial Code (28 U. S. C. A., Section 1257(3)), with respect to a judgment rendered by the highest court of a state in which a decision could be had.

There are special and important reasons for the granting of review on writ of certiorari (Supreme Court Rule 38, par. (5)).

The enforcement of the judgment is stayed by action of the Chief Justice of the court rendering the judgment, in compliance with Section 2101(e) of Title 28, United States Code (Rec. 76).

The time for filing petition for writ of certiorari is extended to and including May 10, 1950, in compliance with Section 2101(c) of Title 28, United States Code (Rec. 77).

Jurisdiction is clear in that it involves issues both of due process of law and equal protection of laws under the 14th Amendment (Rec. 9).

The Questions Presented.

1. Is this a proceeding of criminal contempt of court?

2. If so, may the court ignore the proceedings ordinarily required in such a case?

3. If the procedure were criminal, had the court defined the offense so that it might be known to be criminal by those subject to it?

4. Has the Supreme Court of the State of Colorado distinguished properly between plaintiff and defendant?

5. Although affecting only one person, the judgment in this case, if sustained, may be made applicable to others. Can the court deprive a person of his rights because he has not obtained counsel after a serious effort to do so? And can it do so on the ground that he must act as plaintiff in a transaction in which he is really defending against a state tax on the ground of its inapplicability?

Reasons Relied Upon for Allowance of Writ.

1. The Supreme Court of the State of Colorado erred in holding that the trial as criminal contempt should have no restrictions as such.

2. The Supreme Court of the State of Colorado erred in refusing counsel, and trial in open court, to petitioner.

3. The Supreme Court of the State of Colorado erred in its classification of plaintiffs and defendants.

Respectfully submitted,

WALTER F. DODD,
Attorney for Petitioner.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Judgment Below.

The judgment in this case was the result of an original proceeding, and was entered on December 12, 1949, without an opinion. The judgment is printed on page 75 of the Transcript and is also printed in 212 Pac. 2d, 1007.

Jurisdiction.

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Statement of the Case.

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With respect to the transactions here involved it is obvious that petitioner sought "reasonably to employ counsel to represent him" (Rec. 5, Par. 10), and that such counsel did represent him twice in proceedings in which such representation is denied by respondent. (Rec. 52, 2-3).

The proceeding here brought by respondent relates to the sales tax issue heretofore referred to, and as to which the state trial court said:

> "The Court feels this way about that matter: I think perhaps you have an interest in this matter really as a defendant, that you were appearing to defend against what you claim to be an illegal tax; that in a measure your rights appear to be the rights of a defendant, and that I don't think the case of *Shotkin* v. *Kaplan* is controlling in this particular matter" (Rec. 54, 60).

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Upon three occasions petitioner moved that the State Supreme Court appoint counsel for him in the contempt proceedings, subject to fees to be fixed by the Court; and the Court rejected his motion in each case (Rec. 7, 8, 30, 33, 61, 62). He was also unsuccessful in seeking witnesses in open court, with oral argument (Rec. 10, 16).

On December 12, 1949, the Supreme Court of Colorado issued the following judgment, which is the basis of the present petition:

"ORIGINAL PROCEEDING

Judgment—December 12, 1949

At this time the cause coming on to be heard upon the rule heretofore entered requiring said respondent to show cause why he should not be punished for contempt and also the argument of counsel thereon; the Court being fully advised in the premises, it is accord-

ingly adjudged that the respondent is guilty of contempt of this Court, and it is ordered that the motion for summary judgment be sustained. It is further ordered and adjudged that the respondent is guilty of contempt of Court as charged herein, and that he be confined in the County Jail of the City and County of Denver for and during the period of sixty days; provided, that execution herein shall be stayed until the further order of the Court. En Banc, December 12, 1949." (Rec. 75)

Attention may be called to the fact that there was no counsel who could argue for the petitioner.

Errors Relied Upon.

The Supreme Court of the State of Colorado erred in not complying with the requirements in criminal contempt; and in its distinction between plaintiff and defendant.

Summary of Argument.

There was no basis for a finding of guilt in the case of criminal contempt here tried as an original proceeding by the Supreme Court of the State of Colorado; and no basis for a classification of plaintiffs distinct from defendants when the one represents the same type of interest as the other.

ARGUMENT.

I.

The Case Is One of Criminal Contempt.

The distinction between civil and criminal contempt was well stated in *Gompers* v. *Buck's Stove & Range Company*, 221 U.S. 418 (1911), 445:

> "Proceedings for civil contempt are between the original parties, and are instituted and tried as a part of the main cause. But, on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause."

The proceeding here is obviously one of criminal contempt.

II.

Procedure in Criminal Contempt.

In *Gompers* v. *Buck's Stove & Range Company*, at page 444, the Court said:

> "Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself."

The present strength of the *Gompers* case is illustrated in *United States* v. *United Mine Workers of America*, 330 U.S. 258 (1947). Although Mr. Justice Rutledge dissented in that case, his statements and notes on pages 364-365 and 371-372 indicate the development of the principles of the

Gompers case. Speaking of this case, Mr. Justice Rutledge said, at page 371:

> "What is most important, because the application and observance of all these rights and others depend upon it, is that the person charged is entitled to know from the beginning, not merely at the end or some intermediate stage, in which sort of proceeding he is involved."

With respect to counsel in a criminal case, Mr. Justice Reed recently said for the Court in *Uveges* v. *Pennsylvania*, 335 U.S. 437 (1948):

> "Only when the accused refuses counsel with an understanding of his rights can the court dispense with counsel * * *. Only a waiver of counsel, understandingly made, justifies trial without counsel."

Having indicated the established principles with respect to criminal contempt, it is desirable to indicate their relation to the present case:

(1) Petitioner was denied representation by counsel (Rec. 7, 8, 30, 33, 61, 62) or witnesses in open court, with oral argument (Rec. 10, 16) in direct violation of established legal principles.

(2) The penalty in this case is sought and based upon an order by the Supreme Court of Colorado which appears on page 5 of the Record and which is supplemented by the statement that "There is not involved here the right of a party to represent himself when made defendant or defendant in error."

This Court said in *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of

> fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, 221, 34 S. Ct. 853, 58 L. Ed. 1284; *Collins* v. *Kentucky*, 234 U.S. 634, 638, 34 S. Ct. 924, 58 L. Ed. 1510."

A similar view was recently expressed in *Skinner* v. *State of Oklahoma*, 316 U. S. 535 (1942), and was noted as applied to contempt proceedings by Mr. Justice Rutledge in *United States* v. *United Mine Workers of America*, 330 U. S. 258 (1947), p. 371. Due process of law and equal protection of the laws under the Fourteenth Amendment should equally protect against judicial as well as against legislative results of the same character.

Several questions present themselves: (a) Does the state supreme court have an authority to grant an individual the right to appear in court as defendant without counsel; but to deny an individual all right to appear in court as plaintiff unless he appears by counsel, even though he has issues of the same character and has been unable to obtain counsel, the evidence here showing that he had important interests of similar character and was unable to appear by counsel? (Rec. 47, 48.) Does the classification properly distinguish plaintiffs and defendants, and is there a judicial power to make such a classification? (b) Where, as here, petitioner is defending against the application of a state tax law, but must himself bring suit, is the distinction one justifying a penalty against him if he appears without counsel? (c) If the trial court should recognize that petitioner has the rights of a defendant, as it did (Rec. 60) and that he may appear without counsel, would the penalty imposed upon him by the State Supreme Court

(Rec. 75) be justified, although the trial judge had authority to rule upon his position, and petitioner had right and duty to obey?

Attention may be called to the fact that the State Supreme Court by staying the operation of its sentence "until the further order of the Court" creates an undulating threat of an attainder character; that, while encouraging the lawyer in its original orders to the petitioner, it took an opposing view in a trial for the purpose of penalizing the petitioner; and that there is no charge that the petitioner had at any time behaved improperly in the presence of a court.

Respectfully,

WALTER F. DODD,
Attorney for Petitioner.